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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

SPECTRUM PAINTING CORP. *et al.*,

Defendants.

19 Civ. 2096 (AT)(RWL)

**STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL
AS TO DEFENDANT SPECTRUM PAINTING CORP.**

WHEREAS, this Stipulation and Order of Settlement and Dismissal (“Stipulation”) is entered into by and among plaintiff the United States of America (the “Government” or “United States”), by its attorney, Audrey Strauss, United States Attorney for the Southern District of New York, and defendant Spectrum Painting Corp. (“Spectrum,” and together with the Government, the “Parties”), by its authorized representatives;

WHEREAS, Spectrum is a New York-based painting company;

WHEREAS, the United States Department of Transportation (“US-DOT”) promulgated regulations entitled “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs” to provide opportunities for businesses owned by socially and economically disadvantaged individuals to work on federally-funded public construction projects, *see* 49 C.F.R. Part 26 (the “DBE Regulations”);

WHEREAS, the DBE Regulations require that certain federally-funded projects have specific goals for DBE participation and that contractors make good faith efforts to meet or exceed those DBE goals, *see* 49 C.F.R. §§ 26.37, 26.45, 26.53;

WHEREAS, under the DBE Regulations, payments made to a DBE contractor count toward the DBE goal only if the DBE is performing a “commercially useful function” on the

project, meaning that the DBE is “responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved,” 49 C.F.R. § 26.55;

WHEREAS, Spectrum is not and has never been a DBE contractor, and its work therefore is not and has never been eligible to be counted towards the fulfillment of any DBE goals on federally-funded projects;

WHEREAS, US-DOT provided federal funds to New York City Department of Transportation (“NYC-DOT”) for the Brooklyn-Bridge Rehabilitation project (Contract No. BRC 270 C/P (Contract #6)) (the “Brooklyn Bridge Project”), and NYC-DOT set forth a goal that 14% of the value of the work performed on the project go to DBEs;

WHEREAS, US-DOT provided federal funds to the Metropolitan Transportation Authority and the New York City Transit Authority (together, “MTA”) for work on an elevated structure at Queens Plaza (Contract No. C-34904) (the “Queens Plaza Project”), and MTA set forth a DBE participation goal of 17% of the value of the work on the project;

WHEREAS, the Government commenced this action by filing a complaint in this Court against Spectrum and its co-defendants under the False Claims Act, codified at 31 U.S.C. §§ 3729-3733, and common law, and amended the complaint on August 15, 2019 (the “Amended Complaint”);

WHEREAS, the Amended Complaint alleges that Ahern Painting Contractors, Inc. (“Ahern”), a former co-defendant in this matter that executed a Stipulation and Order of Settlement and Dismissal with the Government in October 2019 (ECF No. 41), entered into contracts to provide industrial painting work on the Brooklyn Bridge Project and the Queens Plaza Project, and represented to NYC-DOT and MTA that it would fulfill the DBE participation goals for the Brooklyn Bridge and Queens Plaza Projects by retaining a DBE – co-defendant

Tower Maintenance Corp. (“Tower”) – to perform steel painting work, which required Tower to perform a commercially useful function on both projects, including by managing and supervising the steel painting work assigned to Tower;

WHEREAS, the Amended Complaint further alleges that Spectrum – a non-DBE – managed and supervised much of the work that Tower was retained to perform as a DBE on the Brooklyn Bridge and Queens Plaza Projects such that Tower did not perform a commercially useful function on either project, and Spectrum thereby knowingly or recklessly caused false or fraudulent claims to be presented to NYC-DOT and to the MTA for payment for the DBE work (the “Covered Conduct”);

WHEREAS, the Parties have, through this Stipulation, reached a mutually agreeable resolution addressing the Government’s claims in the Amended Complaint against Spectrum for the Covered Conduct;

NOW, THEREFORE, upon the Parties’ agreement IT IS HEREBY ORDERED that:

TERMS AND CONDITIONS

1. The Parties agree that this Court has subject matter jurisdiction over this action and consent to this Court’s exercise of personal jurisdiction over each of them.
2. Spectrum admits, acknowledges and accepts responsibility for the following conduct (the “Admitted Conduct”):
 - a. In early 2010, Spectrum knew that Ahern had been awarded a subcontract with Skanska Koch Inc. (“Skanska”) for industrial painting and rehabilitation work on the Brooklyn Bridge Project. Spectrum understood that as a subcontractor on the Brooklyn Bridge Project, Ahern needed to meet or exceed a DBE participation goal or undertake good faith efforts to do so. Spectrum also knew that Ahern expected to use Tower, a certified DBE, to fulfill a significant part of the DBE participation goal for the Brooklyn Bridge Project.
 - b. In or about March 2010, a manager at Spectrum (the “Spectrum Manager”) and a principal at Tower agreed that the two firms would work together on the

Brooklyn Bridge Project. Pursuant to that agreement, the Spectrum Manager conducted a walk-through of the Brooklyn Bridge worksite with the Tower principal and an Ahern superintendent for the Brooklyn Bridge Project. The Spectrum Manager understood that he participated in the walk-through to assist Tower in preparing the bid Tower later submitted to Ahern for its anticipated work as a DBE subcontractor for the Brooklyn Bridge project.

- c. In mid-2010, Spectrum knew that Ahern in fact entered into a subcontract with Tower to perform painting and blasting work on the Brooklyn Bridge Project, to be counted toward that project's DBE participation goal.
- d. Also in mid-2010, Spectrum knew that Ahern entered into a contract with the MTA to provide overcoat painting on the elevated structure at the Queens Plaza subway station, and that Ahern was required to meet or exceed a DBE participation goal for the Queens Plaza Project. Spectrum also knew that Ahern expected to use Tower to fulfill a significant part of the DBE participation goal for the Queens Plaza Project.
- e. In May and June 2011, Spectrum and Tower memorialized two "consulting agreements" for work on the Brooklyn Bridge and the Queens Plaza Projects. Pursuant to those agreements, Spectrum and Tower agreed that Spectrum would "perform certain consulting services," including "providing project management support," and would furnish equipment to Tower for the two projects. The agreements further provided that Spectrum would receive 50% of all profits from the Tower DBE work on the projects.
- f. The key terms of the consulting agreements between Tower and Spectrum – including Tower's agreement to pay Spectrum 50% of all of its profits from the two projects, or Spectrum's agreement to furnish equipment to Tower for the projects – were not disclosed to Ahern, Skanska, NYC-DOT, or MTA.
- g. Throughout the Brooklyn Bridge and Queens Plaza Projects, the Spectrum Manager managed and supervised the DBE work that Tower was retained to perform on each project, such as setting the work schedule, ordering materials for the work, hiring the foreman, inspecting the work performed, and coordinating payment for the work.
- h. The Spectrum Manager also hired other supervisors on the Brooklyn Bridge and Queens Plaza Projects. For example, the Spectrum Manager hired the superintendent for the DBE work assigned to Tower for the Brooklyn Bridge Project and the Queens Plaza Project (the "Spectrum Superintendent"). The Spectrum Manager also hired an individual to oversee health and safety issues related to the DBE work on the two projects (the "Spectrum Safety Supervisor"). Both the Spectrum Superintendent and the Spectrum Safety Supervisor were paid by Spectrum and not by Tower.

- i. The Spectrum Manager, Spectrum Superintendent, and Spectrum Safety Supervisor communicated directly with Ahern regarding the management and supervision of the DBE work assigned to Tower on the Brooklyn Bridge Project and the Queens Plaza Project.
- j. The Spectrum Manager, Spectrum Superintendent, and Spectrum Safety Supervisor were all Spectrum employees. On the Brooklyn Bridge and Queens Plaza Projects, they identified themselves to others working on the projects as Tower employees, including by wearing Tower vests and security identification. In documents submitted to Ahern to obtain security clearances, the Spectrum Manager identified himself as a “Tower VP” or as a Tower employee.
- k. When the Spectrum Manager and Spectrum Superintendent met with NYC-DOT inspectors monitoring compliance with DBE Regulations on the Brooklyn Bridge Project in 2012, the Spectrum Manager and Spectrum Superintendent represented that they were employed by Tower. Specifically, the Spectrum Manager told the NYC-DOT inspectors that he was an “estimator” who usually worked at Tower’s main office and that he seldom went to the Brooklyn Bridge job site. However, the Spectrum Manager and Spectrum Superintendent were employed by Spectrum, and the Spectrum Manager was a project manager on the Brooklyn Bridge Project often working at the Brooklyn Bridge job site.
- l. Likewise, when the Spectrum Manager attended a meeting with NYC-DOT in March 2013 regarding the status of Tower’s DBE work on the Brooklyn Bridge Project, he identified himself as a Tower representative, rather than as a representative of Spectrum.

3. Within twenty (20) business days of the Effective Date (defined below in Paragraph 22), Spectrum shall pay to the Government the sum of \$400,000.00 plus interest which shall be compounded annually at a rate of 2.25% accruing from June 10, 2021, to the date of payment (the “Settlement Amount”) in accordance with instructions to be provided by the Financial Litigation Unit of the United States Attorney’s Office for the Southern District of New York. Of the Settlement Amount, \$200,000.00 plus the applicable interest constitutes restitution to the Government.

4. Spectrum agrees to cooperate fully and truthfully with the Government’s investigation of individuals and entities not released in this Stipulation. Upon reasonable notice,

Spectrum shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Spectrum further agrees to furnish to the Government, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

5. Subject to the exceptions in Paragraph 7 (concerning reserved claims) below and subject to Paragraph 8 (concerning default) and Paragraph 11 (concerning bankruptcy proceedings) below, and conditioned on Spectrum's full compliance with the terms of this Stipulation, including full payment of the Settlement Amount to the Government pursuant to Paragraph 3 above, the Government releases Spectrum, including its subsidiaries and corporate predecessors, successors and assigns, from any civil or administrative monetary claim that the Government has for the Covered Conduct under the FCA, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, and the common law theories of fraud, payment by mistake, and unjust enrichment. For avoidance of doubt, this Stipulation does not release any current or former officer, director, employee, or agent of Spectrum from liability of any kind.

6. Spectrum fully and finally releases the United States, its agencies, officers, employees, servants, and agents from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Spectrum has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, employees, servants, or agents related to the Covered Conduct or the United States' investigation, prosecution and settlement thereof.

7. Notwithstanding the releases given in Paragraph 5 above, or any other term of this Stipulation, the following claims of the Government are specifically reserved and are not released by this Stipulation:

- a. any liability arising under Title 26, United States Code (Internal Revenue Code);
- b. any criminal liability;
- c. except as explicitly stated in this Stipulation, any administrative liability, enforcement right, or suspension or debarment rights of any federal agency;
- d. any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. any liability based upon obligations created by this Stipulation; and
- f. any liability of individuals.

8. Spectrum shall be in default of this Stipulation if it fails to make the required payment set forth in Paragraph 3 above on or before the due date for such payment, or if it fails to comply materially with any other term of this Stipulation that applies to it (“Default”). The Government will provide a written Notice of Default to Spectrum of any Default in the manner set forth below. Spectrum shall then have an opportunity to cure the Default within seven (7) calendar days from the date of receipt of the Notice of Default by making the payment due and paying any additional interest accruing under the Stipulation up to the date of payment. If Spectrum fails to cure the Default within seven (7) calendar days of receiving the Notice of Default (“Uncured Default”), interest on the remaining unpaid balance shall thereafter accrue at the rate of 12% per annum, compounded daily from the date of Default, on the remaining unpaid total (principal and interest balance). In the event of an Uncured Default, Spectrum shall agree to the entry of a consent judgment in favor of the Government against Spectrum in the amount of the Settlement Amount as attached hereto as Exhibit A. Spectrum also agrees that the Government, at its sole discretion,

may (i) retain any payments previously made, rescind this Stipulation, and reinstate the claims asserted against Spectrum in the Amended Complaint, or bring any civil and/or administrative claim, action, or proceeding against Spectrum for the claims that would otherwise be covered by the releases provided in Paragraph 5 above, with any recovery reduced by the amount of any payments previously made by Spectrum to the Government under this Stipulation; (ii) take any action to enforce this Stipulation in a new action or by reinstating the Amended Complaint; (iii) offset the remaining unpaid balance from any amounts due and owing to Spectrum and/or affiliated companies by any department, agency, or agent of the Government at the time of Default or subsequently; and/or (iv) exercise any other right granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. The Government shall be entitled to any other rights granted by law or in equity by reason of Default, including referral of this matter for private collection. In the event the Government pursues a collection action, Spectrum agrees immediately to pay the Government the greater of (i) a ten-percent (10%) surcharge of the amount collected, as allowed by 28 U.S.C. § 3011(a), or (ii) the Government's reasonable attorneys' fees and expenses incurred in such an action. In the event that the Government opts to rescind this Stipulation pursuant to this paragraph, Spectrum waives and agrees not to plead, argue, or otherwise raise any defenses of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims that (i) are filed by the Government against Spectrum within 120 days of written notification that this Stipulation has been rescinded, and (ii) relate to the Covered Conduct, except to the extent these defenses were available on August 15, 2019. Spectrum agrees not to contest any offset, recoupment, and /or collection action undertaken by the Government pursuant to this paragraph, either administratively or in any state or federal court, except on the grounds of actual payment to the Government.

9. Spectrum, having truthfully admitted to the Admitted Conduct set forth in Paragraph 2 above, agrees it shall not, through its attorneys, agents, officers, or employees, make any public statement, including but not limited to, any statement in a press release, social media forum, or website, that contradicts or is inconsistent with the Admitted Conduct or suggests that the Admitted Conduct is not wrongful (a “Contradictory Statement”). Any Contradictory Statement by Spectrum, its attorneys, agents, officers, or employees, shall constitute a violation of this Stipulation, thereby authorizing the Government to pursue any of the remedies set forth in Paragraph 8 above, or seek other appropriate relief from the Court. Before pursuing any remedy, the Government shall notify Spectrum that it has determined that Spectrum has made a Contradictory Statement. Upon receiving notice from the Government, Spectrum may cure the violation by repudiating the Contradictory Statement in a press release or other public statement within four business days. If Spectrum learns of a potential Contradictory Statement by its attorneys, agents, officers, or employees, Spectrum must notify the Government of the statement within 24 hours. The decision as to whether any statement constitutes a Contradictory Statement or will be imputed to Spectrum for the purpose of this Stipulation, or whether Spectrum adequately repudiated a Contradictory Statement to cure a violation of this Stipulation, shall be within the sole discretion of the Government. Consistent with this provision, Spectrum may raise defenses and/or assert affirmative claims or defenses in any proceeding brought by private and/or public parties, so long as doing so would not contradict or be inconsistent with the Admitted Conduct.

10. Spectrum waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action.

11. In exchange for valuable consideration provided in this Stipulation, Spectrum acknowledges the following:

- a. Spectrum has reviewed its financial situation and warrants that it is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I) and shall remain solvent following payment to the United States of the Settlement Amount.
- b. In evaluating whether to execute this Agreement, the Parties intend that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to Spectrum, within the meaning of 11 U.S.C. § 547(c)(1), and the Parties conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange.
- c. The mutual promises, covenants, and obligations set forth herein are intended by the Parties to, and do in fact, constitute a reasonably equivalent exchange of value.
- d. The Parties do not intend to hinder, delay, or defraud any entity to which Spectrum was or became indebted on or after the date of any transfer contemplated in this Stipulation, within the meaning of 11 U.S.C. § 548(a)(1).
- e. If Spectrum's obligations under this Stipulation are avoided for any reason (including but not limited to through the exercise of a trustee's avoidance powers under the Bankruptcy Code) or if, before the Settlement Amount is paid in full, Spectrum or a third party commences a case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors seeking any order for relief of Spectrum's debts, or to adjudicate Spectrum as bankrupt or insolvent, or seeking appointment of a receiver, trustee, custodian, or other similar official for Spectrum or for all or any substantial part of Spectrum's assets:
 - (1) the Government may rescind the releases in this Stipulation and bring any civil and/or administrative claim, action, or proceeding against Spectrum

for the claims that would otherwise be covered by the releases provided in Paragraph 5 above; and

- (2) the Government has an undisputed, noncontingent, and liquidated allowed claim against Spectrum in the amount of \$400,000, less any payments received pursuant to the Stipulation, provided, however, that such payments are not otherwise avoided and recovered from the Government by Spectrum, a receiver, trustee, custodian, or other similar official for Spectrum.

- f. Spectrum agrees that any civil and/or administrative claim, action, or proceeding brought by the Government under Paragraph 11(e) above is not subject to an “automatic stay” pursuant to 11 U.S.C. § 362(a) because it would be an exercise of the Government’s police and regulatory power. Spectrum shall not argue or otherwise contend that the Government’s claim, action, or proceeding is subject to an automatic stay and, to the extent necessary, consents to relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1). Spectrum waives and shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claim, action, or proceeding brought by the Government within 120 days of written notification to Spectrum that the releases have been rescinded pursuant to this paragraph, except to the extent such defenses were available on August 15, 2019.

12. Spectrum agrees to the following:

- a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Spectrum and its present or former officers, directors, employees, shareholders, and agents in connection with:
 - (1) the matters covered by this Stipulation;
 - (2) the United States’ audit(s) and civil investigation(s) of the matters covered by this Stipulation;

- (3) Spectrum's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Stipulation (including attorney's fees);
- (4) the negotiation and performance of this Stipulation;
- (5) the payment Spectrum makes to the United States pursuant to this Agreement,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

- b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Spectrum, and Spectrum shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.
- c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Stipulation, Spectrum shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Spectrum or any of its subsidiaries or affiliates from the United States. Spectrum agrees that the United States, at a minimum, shall be entitled to recoup from Spectrum any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Spectrum's books and records and to disagree with any calculations submitted by Spectrum or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Spectrum, or the effect of any such Unallowable Costs on the amount of such payments.

13. This Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity except as otherwise provided herein.

14. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

15. Any failure by the Government to insist upon the full or material performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon the full or material performance of any and all of the provisions of this Stipulation.

16. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

17. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties. Forbearance by the Government from pursuing any remedy or relief available to it under this Agreement shall not constitute a waiver of rights under this Stipulation.

18. The undersigned counsel represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and the entities indicated below.

19. This Stipulation is binding on Spectrum's successors, transferees, heirs, and assigns.

20. Any notice pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be delivered by hand, express courier, or e-mail transmission followed by postage-prepaid mail, and shall be addressed as follows:

TO THE UNITED STATES:

Mónica P. Folch, Li Yu, and David J. Kennedy

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TO DEFENDANT SPECTRUM:

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21. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. E-mails that attach signatures in PDF form or facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

22. The effective date of this Stipulation is the date upon which the Stipulation is approved by the Court (the "Effective Date").

Agreed to by:

FOR THE UNITED STATES:

Dated: New York, New York
July 9, 2021

AUDREY STRAUSS
United States Attorney for the
Southern District of New York

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FOR DEFENDANT SPECTRUM:

Dated: New York New York
July 8, 2021

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SO ORDERED.

Dated: July 12, 2021
New York, New York


ANALISA TORRES
United States District Judge